United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6011

No. 75-6011

B/S

In the United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

HEALTHCO, INC.,
Defendant-Appellee.

On Cross-Appeals From The United States District Court
For The Southern District Of New York

BRIEF FOR HEALTHCO, INC.

Of Counsel
IRA M. MILLSTEIN
PETER D. STANDISH
Attorneys
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

EDWARD L. FOOTE
THOMAS WM. BIANCHI
Attorneys
Winston & Strawn
Suite 5000
One First National Plaza
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

3

INDEX

PAGE

LIST OF AUTHORITIES

CASES

PAGE

STATUTES

REFERENCE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-6011

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

HEALTHCO, INC.,

Defendant-Appellee.

On Cross-Appeals From The United States District Court
For The Southern District Of New York

BRIEF FOR DEFENDANT HEALTHCO, INC.

ISSUES PRESENTED

This case involves the application of the merger statute (Section 7 of The Clayton Act) to an industry generally described as the sale of dental products which includes dental equipment, sundries, artificial teeth and dental precious metals purchased by users of those products in the New York metropolitan area.

Healthco, Inc. acquired four dental product dealers respectively located in Manhattan, Long Island, New Jersey and Westchester County. The District Court found in favor of Healthco on all charges except those relating to the distribution of dental equipment. The government has appealed from the decision complaining of the remedy directing divestiture of the dental equipment business, which is the only violation found. The government has

also appealed from the trial court's finding that no violation occurred in the distribution of "sundries."

Healthco's appeal challenges the findings of a violation of Section 7 with respect to dental equipment sales.

1. The District Court erred in failing to recognize the numerous alternate sources of supply available to buyers of dental equipment.

2. The District Court erred in failing to recognize the substantial new entrants (manufacturers and dealers) providing alternate sources of supply to the customers and viable substantial competition to the traditional dental dealer.

3. The acquisitions in question did not eliminate any substantial horizontal competition in the sale of dental equipment because of the highly competitive nature and growth of the industry.

4. The court further erred in finding a violation of Section 7 in acquisitions of the defendant which were marginal or market extensions (not horizontal).

5. The District Court's finding that the defendant has acquired a substantial percentage of the dental equipment industry in the New York metropolitan area is not supported by any reliable evidence of record.

STATEMENT OF THE CASE

The dental products industry and its various segments have experienced intense growing competition in recent years. The overall size of the market has grown substantially and as a result, traditional methods of distribution have been challenged by new competitive factors which have entered the market. No longer is the traditional local dental dealer the sole, or in many cases even the basic, source of supply to the various dental customers—

dentists, dental laboratories and institutions. New competition has shifted buying patterns, increased the variety and numbers of sources of supply, and substantially increased price competition.

Healthco entered this expanding and competitive New York market by acquiring S.S. White (Manhattan) and then adding two marginal properties: one of these (General) also in Manhattan was then administered by a creditor's committee and the other (Sechter) was a New Jersey distributor with financial difficulties and no profits. (T 546-548; PX 46 pp. 11-13; PX 57 pp. 3-5; T 552-553)[1]

Healthco also acquired a Syosset Long Island distributor (Hebard Metro) and entered Westchester County with the market extension acquisition of Hebard.

The government "surveyed" 64 such distributors in the New York area (PX 31, 31a); the Bureau of Census lists 118 establishments (DX A)—and the District Court found that viable new competition, in addition to such traditional dealers, has stimulated price competition and expanded and changed customary distribution channels. (DC 22, 23, 35, 36) In short the customers have a growing number of alternative sources of supply to shop for their products. (T 102-106; T 224-225; T 403-405; T 478, 482; DX M p. 15-16; DX N-1 Answers to Questions 8, 10)

The changing structure of the industry thus requires a specific examination of the level and extent of competition between various sellers and three different classes of buyers: institutions, dental laboratories and dentists.

The District Court dismissed the case as to all products, except dental equipment, because these buyers have an expanding list of sellers making it impossible to predict any lessening of competition as a result of defendant's acquisitions. (DC 21, 35, 36)

---

[1] The abbreviations used to refer to the record in the brief of the United States are adopted in this brief.

Precious Metals and Artificial Teeth

A dental laboratory purchases dental precious metals and artificial teeth either directly from manufacturers (national suppliers) or through the local wholesaler or dental dealer. (PX 45, T 482, PX 46) The complaint charged that the sale of dental precious metals and artificial teeth were each "product markets" but since these items, primarily sold to laboratories, can be purchased by that customer on a regional or national basis, no findings of a violation were tendered or entered on that aspect of the case. (DC 21)

Sundries: The Major Product Market; No Violation Found

Approximately 65% of all dental products sold are sundries. (Calculation based on DX A) Dental dealers generally handle a considerable volume of sundries which are "non-durable, consumable products such as materials for filling, anesthetics, impression materials, waxes, cements, dental chemicals, nonprecious metals and dental burrs." (DC 4) The local sundries dealer sells to all classes of customers: dentists, laboratories, and institutional customers (i.e., hospitals and dental schools). (PX 31) The sundries business involves substantial national and regional competition because of the growth within the last decade of mail order houses as well as manufacturers' direct sales of these products to dentists and other customers. (DC 22, 25, 26, 35, 36; PX 45; DX N-8 Answer to Questions 8, 10); T 102-106; T 224-225; T 403-405, 478, 482; DX M p. 15-16)

The District Court found that mail order companies were in fact "dental dealers"; and do compete with local

dealers in selling to dentists, laboratories and institutions. (DC 23; T 204) In its Opinion, the court stated:

> The characteristics of dental dealers and mail order houses are sufficiently alike to be considered together.
>
> * * *
>
> The most important class of customers, the dentists, do nearly all their buying from dental dealers and mail order houses. (DC 26)
>
> Mail order houses are recognized by dealers as an increasing force in the dental sundries sub-market. No trained service force and no specialists are required in the sundries sub-market. This sub-market as covered by the government's survey shows no significant concentration of sellers; there are in 1970, 57 sellers in this sub-market and the evidence suggests strongly that mail order houses would add significantly to the number of sellers. Moreover, there has been some shift by full line dealers away from that status; for example, Dental Equipment Specialist shifted from full line dental dealer to mail order house.
>
> In the dental sundries sub-market, the share controlled by Healthco, the increasing trend of mail order houses as a competitive force in this market, and other evidence satisfy this Court that Section 7 has not been violated by the four challenged acquisitions. (DC 35, 36)

These findings are well supported in the record. (T 224-225; T 403-405; T 474; T 577; T 707; T 782; DX N-1 Answer to Questions 8 and 10; DX D, DX J, DX K)

Henry Walter, a traditional "dental dealer," called by the plaintiff, testified as follows:

> Q. Have you ever inspected those [mail order] catalogs and compared them with the price at which you were selling?

A. Almost daily routine.

Q. Do you find that they are selling cheaper than you are selling?

A. In many, many instances.

Q. And that is an appeal to the dentists?

A. Some.

Q. And that accounts for the growth of the mail order house, doesn't it?

A. Yes.

• • •

A. I would say that competition has changed over those years.

Q. You would say that?

A. That competition has changed over those years.

Q. In what way?

A. The influx and the continued growth of the catalog houses as far as we can tell.
(T 103-106)

Defendant's expert witness, David Ellis, testified to the same effect:

> A. Well, possibly this is a reflection of our times, but dentists have become cost conscious and they are today purchasing materials, supplies, equipment from a variety of sources. (T 403)

The plaintiff failed to recognize these industry changes, and the "questionnaire" used to measure the industry was filled out by only 64 competitors. (PX 46)

The Bureau of Census provides a check on the number of dental product sellers. The Census lists 118 Merchant Wholesalers under The Commerce Department's Census classification: "Merchant Wholesalers—Professional Equipment and Supplies, Dental Supplies." In 1967 each of these was located, according to the Census, in the New York metropolitan area as defined in this case. (DX A)

In addition, many mail order houses and other dental dealers, located outside the geographic limits of the New York area, compete within the New York area. (T 223-24; T 424; T 694)

The following companies, mostly mail order companies, which were not sent questionnaires by the government, can and do provide alternative sources of supply for all classes of customers located in the New York metropolitan area:

Coldweli
Direct Dental Services
Dental Mart, Inc.
Dental Film Co.
Dental Wholesalers
Command
John O. Butler
Parkell
Executive Cabinet
Orthopantomograph
Lincoln Dental
Safco Dental
American Gold
Professional Cushion
Superba
Kendall Co.
Buffalo Dental
Savecon Dental
B. D. Van Kleek
Moss X-Ray
Sherry Pharmaceutical
Wollins
Blank Drug Co.

(T 117-130; 254)

The record affirmatively demonstrates that specific market entry of mail order houses as well as other dental dealers which offer additional and substantial competition to the "traditional" New York based dental wholesalers has occurred both before and after Healthco's entrance to the New York area.

For example, the following companies entered the New York market in the years indicated below:

(1) *Interstate.* This New York area mail order company began selling to dental laboratories during 1973. (T 707)

(2) *Unitek Corporation.* This California based manufacturer of dental products has an outlet in Englewood, New Jersey, and entered the general

dental supply business during 1967-68. (DX M pp. 8-9; DX M-1)

(3) *Catalog Sales.* This Long Island based dental dealer entered the dental products market after 1968. (T 170)

(4) *Affiliated.* This New York area dental dealer entered the dental products market in 1966. (PX 23)

(5) *Alvy.* This dental dealer entered the dental products market in 1966. (PX 23)

(6) *Belvac.* This New York area based mail order house entered the dental supply business in approximately 1968. (T 242)

(7) *Nobiliam.* This dental products seller expanded sales to all classes of customers in 1969. (PX 45)

(8) *Seimans.* This equipment manufacturer began selling dental equipment directly to dentists in 1969. Its sales went from $50,000 in 1969 to $350,000 in 1970. (PX 45)

Apart from the evidence of specific competitors entering the market for the sale of dental products in New York, two of plaintiff's witnesses testified at the trial that the number of sellers of dental products had increased within 5 to 10 years prior to the trial (T 135, 136, T 224, 225) as did defendant's witnesses. (T. 707)

As a result of all of these factors demonstrating vigorous existing competition and substantial increases in competition brought about by these new and different methods of distribution, the District Court affirmatively found that the acquisition by Healthco of local distributors in New Jersey, Manhattan, Long Island and Westchester County did not violate Section 7 in the distribution of sundries. In doing so, the Court was specifically critical of the government "survey," which the Court found did not properly assess the market. (DC 35, 36).

All Dental Products

The suggestion in the government's appeal brief that "all dental products constitutes a line of commerce" has no record support. The government did not submit findings suggesting a violation of the law in sales of teeth, precious metals and many other dental products purchased by laboratories or dentists from all over the United States; clearly, a broad regional distribution market. If "all dental products" is somehow regarded as a line of commerce, then the market must necessarily include the alternative sources of supply that each customer can turn to for all these different products. In short, the mail order customers from around the country, manufacturers and supply houses in many states should be included in the market if "all dental products" by some alchemy has become a line of commerce in this proceeding.

There are no common characteristics in price or distribution patterns which support the suggestion that all of these heterogeneous products represent a single line of commerce.

The Acquisitions

The government has portrayed the acquisitions as a series of viable, aggressive, "horizontal" competitors removed from competition. Actually, several of these companies were in precarious financial condition as a result of the changing industry structure and were experiencing serious business problems. (T 537-538; 541-554)

Healthco continued to operate these dealers in the face of new and vigorous competition, thereby preventing their demise, and preserved them as an additional source of supply for dental customers.

Healthco's Entry

Healthco entered the market in 1969 by purchasing certain assets of S. S. White which had been ordered divested in another lawsuit by the government. Healthco had hoped to make a successful entry by utilizing the S. S. White salesmen; unfortunately half of the salesmen acquired from S. S. White left within the first few months of Healthco's purchase. By the time of the trial, only four remained out of the original 20 salesmen. (T 542-43) This operation was described by Healthco's President, Mr. Cyker, in detail at 549 and 550. He testified that the outlets purchased were suffering losses: "We were forced to close in the Bronx and in Brooklyn because there was not enough business. We had a lot of problems with the help . . . , and [the outlets] were in bad sections . . . Nobody wanted to work there and make deliveries. So we closed the Bronx and Brooklyn." (T 549-550). In essence, Healthco found itself with about one-half of what it thought had been purchased. (T 541-542).

The Marginal Additions

General Dental Supply with a single outlet was added in May of 1969. Since 1960 that property had been in the hands of a committee operating it for the benefit of creditors. The indebtedness of General as of 1967 was $675,000, far above its assets. The owners were seriously considering liquidation and were on the threshold of a total industry exit at the time of the acquisition. The suggestion that this property was a viable horizontal competitor is a clear overstatement of the facts. General was one of the weaker traditional dental dealers in the market having difficulty competing with new competition. Obviously, some companies fared better than others in

that "transformation." General was faring badly. (T 546-548; PX 46, pp. 11, 12, 13; PX 57, pp. 3, 4)

In June of 1969, Healthco acquired M. A. Sechter Dental Equipment and Supply Co., Inc., a local dental dealer with its principal place of business in Hackensack, New Jersey.

Sechter sold primarily in New Jersey. (T Cyker 552) Sechter was a marginal operation at the time of its acquisition. It was kept in business only because its officers were loaning the company 40% of their salaries. Its profits from 1965 through 1968 were as follows:

	NET PROFITS
1965	$26,490
1966	23,913
1967	1,055
1968	2,822

(PX 57, p. 5)

The acquisition of Sechter allowed Healthco to enter the New Jersey market and maintained Sechter as a competitor there. (T 552, 553)

As of this point (June of 1969) it is difficult to see how Healthco had substantially affected competition or attempted to monopolize the industry under any market definition.

The Syosset Acquisition

Thereafter Healthco acquired Herbard-Metro which distributed dental products out of Syosset, Long Island. This company did not sell into New Jersey, but did compete in Queens, Brooklyn and Manhattan with the marginal properties that Healthco had acquired in Manhattan. (PX 13) To this extent, the government is correct in classifying this company as a viable horizontal acquisition.

Westchester—A Market Extension Acquisition

Healthco from New Jersey or Manhattan delivered a de minimis percentage of its dental products into Westchester County. (PX 8, 10, 11) The Syosset property (Long Island) likewise had virtually no sales into the suburban counties north of Long Island. (PX 13) The Hebard acquisition was a market extension, not a horizontal acquisition. Not a shred of testimony or documentary proof can be found to the contrary. The Westchester acquisition permitted Healthco to serve that area, by simply substituting Healthco as the owner of those assets. The acquisition did not affect the market conditions in the Westerchester area one iota, nor is there any suggestion in this record that it in any way affected any portion of the New York area.

Summary

The government has attempted to make it appear that Healthco made a series of viable horizontal acquisitions. Indeed, the appeal brief repeatedly emphasizes that erroneous statement. In fact, S. S. White, General and Sechter were dental dealers with very serious problems. But for Healthco's interest in entering this market, those properties would probably not be in existence today. Thereafter, a market extension acquisition of Hebard permitted Healthco to enter the Westchester County area. Finally, one viable horizontal acquisition occurred when the company purchased Hebard-Metro. Hebard-Metro did not compete in Westchester County or New Jersey but did compete in Manhattan, Brooklyn and Queens. A fair analysis of this case would require the government to admit those uncontested facts. Thus, the entire case involves an acquisition of one viable hori-

zontal competitor (Hebard-Metro). Significantly, Hebard-Metro's total equipment sales—the area in which a violation was found—totaled only $856,000 in 1968. (PX 13)

Dental Equipment: The Product Market in Which a Violation Was Found

The District Court found a violation in the sale of dental equipment *to dentists* in the New York metropolitan area. The defendant appeals from that finding.

The record establishes the following:

First: Dental equipment is sold by various types of suppliers to three types of customers: institutions who purchase substantial volumes of equipment by soliciting bids over a wide, often national, geographic area, laboratories who purchase some equipment, and dentists who purchase a substantial volume of the total equipment sales. The District Court, however, focused only on sales of equipment to dentists.

Second: The plaintiff did not call any customers or users of dental equipment to answer the threshold market determination questions: (a) what are the various sources of supply available, and (b) among what categories of users do these sources of supply compete. The complaint simply alleged that the sale of dental equipment by dental dealers was a product sub-market.

Third: The sources of supply available to dentists change depending on what type of dental equipment purchase is being made. The record shows that dentists purchase dental equipment at two different times. (Kalik Aff. I ¶ 11, 12) When the dentist opens his office, he must make an

initial purchase of equipment. i.e., a dental chair, x-ray equipment and what is called a "dental unit." On average the dentist will spend $15,000 to open his office, most of which is for equipment. (T 77-81, 111) The number of new dentists opening practices in the New York area each year is not of record. However, the government is correct in stating that "the number of new customers entering this sub-market each year is comparatively small." (Brief for Plaintiff-Appellant p. 39, n. 34)

Each year thereafter as his practice grows, the dentist may purchase additional specific pieces of equipment, new equipment that comes on the market offered by a manufacturer, or the replacements for equipment purchased at the time his office was opened. In this "replacement" or added equipment market, substantial competition exists between the dental dealer, manufacturers and mail order houses. (Kalik Aff. I ¶ 11, 12)

To a dentist beginning his practice the usual source of initial supply is a company offering equipment and perhaps office design and installation service. The Court found that "[d]entis *when* opening an office, require the services of a den dealer." (DC 6) This dentist may well select from a relatively small group of local dealers who have those characteristics. (T 165)

In the added or replacement equipment market, however, a much wider group of suppliers which includes mail order houses and manufacturers, which sell equipment, can be used by the dentist as an alternative supply. (Infra. p. 23, Kalik Aff. I ¶ 11, 12)

Fourth: Plaintiff's Exhibit 45 is a compilation of all dental product sales directly to the ultimate customers

by manufacturers, *including dentists*. Manufacturers are viable competitors and can easily obtain installation and repair services. The District Court affirmatively found (DC 9):

> "Manufacturers do not install or supply services for equipment. However, installation and repair services are available from independent companies specializing in such services."

This new competition from manufacturers of new technology or replacement equipment sold piece by piece to a dentist *after he opens his office* was totally ignored by the government.

The traditional "dental dealers" compete with mail order houses and at least each of the following manufacturers who sold dental equipment in the New York market to "dentists, laboratories and institutions." Each of the following competitors was overlooked when the Court found that no significant competition exists between dealers and manufacturers:

Company Name	Location	Dollar Volume of Sales to Dentists, Laboratories and Institutions 1968	1969	1970
Corning Rubber Co., Inc.	Brookyn, N.Y.	$ 37,000	$ 28,400	$ 26,700
Dent-Chem Division of N.Y. Dental Mfg. Co.	Bronx, N.Y.	3,000	700	2,700
Engelhard Industries Division of Engelhard Minerals and Chemicals Corp.	Cartaret, N.J.	142,354	130,153	98,628
Flexiplast Inc.	Brooklyn, N.Y.	10,000	10,000	10,000
Foredom Electric Co.	Bethel, Conn.	400	300	300
Grenz X-Ray Corp. of America	Newark, N.J.	10,000	10,000	10,000
Handler Manufacturing Company, Inc.	Garwood, N.J.	1,000	1,000	1,000
Dentorium Products Co.	New York, N.Y.	335,600	247,100	269,600
Ellman Dental Mfg.	Cedarhurst, N.Y.	40,000	50,000	60,000
Emesco Dental Corp.	New York, N.Y.	32,084	37,609	16,507
Howmedica Inc. (Luxene)	Chicago, Ill. (on Reply) New York, N.Y. (on Card)	533,000	598,000	580,000
Medical Gases Inc.	Brooklyn, N.Y.	144,000	187,000	196,000
National Keystone Products Co.	Philadelphia, Pa.	39,500	25,800	33,000
NII Laboratory Furniture Inc.	Hicksville, L.I., N.Y.	13,000	15,000	110,000
Niranium Corp.	Queens, L.I., N.Y.	150,000	150,000	150,000
Nobilium Processing and Products Co. Inc.	New York, N.Y.		86,000	121,000
Ormco Corp.	White Plains, N.Y.	$ 210,798	$ 216,112	$ 231,914
Ormont Drug and Chemical Co. Inc.	Englewood, N.J.	4,725	4,725	7,700
Professional Equipment Mfg. Co.	Kenilworth, N.J.	80,000	140,000	160,000
Regal Dental Co.	Rosedale, N.Y.	533	552	304
Rocky Mountain Dental Products	Denver, Col.	388,000	443,000	417,000
Siemans Mfg. Company	Iselin, N.J.		50,000	350,000
Stern Dental Co.	Mt. Vernon, N.Y.	2,000	2,000	2,000
Ticonium Division of CMP Industries Inc.	Albany, N.Y.	55,000	55,000	55,000
Unitek Corp. (Superba)	Englewood Cliffs, N.J.	567,251	580,223	707,335
Vernon-Benshoff Co.	Albany, N.Y.	1,000	1,000	1,000
Eastman Kodak Co.	Rochester, N.Y.	3,788	4,355	11,883
J.F. Jelenko & Co.	New Rochelle, N.Y.	223,336	351,403	324,167
Kerr Mfg. Co.	Romulus, Mich.	2,470	5,603	8,086
Peerless Appliance Co., Inc.	Hollywood, Fla.	1,032	454	375
J. Aderer Inc.	Long Island City, N.Y.	151,163	157,340	174,272
Americana X-Ray Co.	Englewood, N.J.	5,000	5,000	5,000
Bar-Ray Products Inc.	Brooklyn, N.Y.	5,000	5,000	5,000
Cameron-Miller Surgical Instruments	Chicago, Ill.	18,000	19,000	26,500

Fifth: There is of record in the divestiture hearing evidence that the dealers compete with such manufacturers for sales to dentists, particularly in the equipment replacement market:

> Approximately thirty percent (30%) of dental equipment sales to dentists are to new dentists who are setting up practice. The other purchases by dentists of particular items or pieces of equipment are selected from catalogues and the established dentists buy such items direct from manufacturers or from a dealer.
>
> In 1974 Healthco sold in Metropolitan New York approximately $1.2 million of dental equipment to new dentists. Other sales of dental equipment were made to institutions, established dentists and laboratories; such sales were of particular pieces and Healthco in making these sales competed with new manufacturers, dealers and mail order houses listed above (as well as the many pre-existing manufacturers and other competitors).
>
> In 1974 Healthco's total equipment sales in metropolitan New York to all dentists was $3.8 million.
>
> (Kalik Aff. I ¶ 11, 12, 13)

Sixth: The record, and the approach taken by the government in gathering market data, does not permit an accurate measurement of the total dental equipment market. Plaintiff's Exhibit 26, the questionnaire sent to dental dealers, requests the percentage breakdown of sales by *product group* (not class of customer) in Question 1. Question 3 requests only the aggregate dollar volume of sales to the three classes of customers—dentists, dental laboratories, and institutions and government agencies. No data was requested to show the breakdown of sales by product line to the various classes of customer. As

a result of the design of the government's questionnaire, the *percentage of equipment sales by dental dealers to the various classes of customers cannot be determined.* Similarly, the questionnaire sent to the manufacturers listed in PX 45 requested no breakdown of the sales by product group or by class of customer with the result that the *percentage of manufacturers' sales of equipment to the various customers cannot be determined.* The Trial Judge found:

> Manufacturers make some direct sales to dental customers. These sales are not *significant* to dentists but are concentrated to government institutions and dental laboratories. (DC 8)

Not a single piece of sales data supports this conclusion. The conclusion is based entirely on the finding that for the new dentist, the traditional local dealer is the primary source of supply. Sales to these new dentists in this local market have been admitted by the government to be "comparatively small." Indeed, the record demonstrates that such sales constitute only 22% of Healthco's total equipment sales. (Calculation based on PX 59 and Kalik Aff. I ¶ 11) As a result, the Trial Court's finding, quoted above, is not a reason to exclude manufacturers' sales in considering the effect on competition of Healthco's acquisitions in the equipment sales submarket. The record conclusively shows that 78%—the vast bulk—of Healthco's equipment sales compete in the broader national market recognized by the Trial Court to *include* manufacturer and mail order sales. (DC 8)

Seventh: In the divestiture or remedy hearing the extent of entry and new competition that has occurred in recent years was placed of record.

Since 1969, there have been eleven (11) new companies who manufacture and sell dental chairs. Those companies are as follows:

1. Dentsply
2. Litton
3. Midwest American
4. Parkell
5. Pelton & Crane
6. Unitek
7. Micro
8. Scope
9. Ormco Corp.
10. Morse
11. Westwood Dental Mfg. Co.

(Kalik Aff. I ¶4)

There are now over fifty (50) manufacturers of dental units in the United States. Twenty-six (26) of these companies have entered the market since 1969. Those companies are:

1. Belvedere
2. Biotec
3. Dental-Ez
4. Dentsply
5. Health-Kit Corp.
6. Litton
7. Parkell
8. Pelton & Crane
9. Star
10. Unitek
11. Health-Science Products
12. Hi-Low Dental Equipment
13. Shelley
14. Proma (Progressive Machine Products)
15. Scope
16. Simplified Concepts
17. Viking Inc.
18. Ergonamic Environment Inc.
19. Executive Cabinet Co.
20. Erik Industries
21. Morse
22. McKesson
23. Beaver State Dental
24. Burton Cabinet Co.
25. Winders of Seattle
26. Lelaxadent

(Kalik Aff. I ¶5)

Since 1969 more than 25 other companies have entered the market selling smaller pieces of equipment.

Within the last three years, additional dental dealers have entered the Metropolitan New York area selling dental equipment. A partial list of these firms follows:

a) The Avis Leasing Co., 666 Fifth Avenue, New York, New York, which began as a dental equipment leasing company, now also sells all major lines of dental equipment.

b) University Dental Supply, 200 E. 23rd Street in New York, entered business within the last six months as a full service dental dealer. This company has announced that it is offering all major brands of equipment and supplies.

c) Salzman Dental Co., 902 Coney Island Avenue, Brooklyn, New York, began selling dental equipment and service for that equipment within the past year.

d) The Becker-Parkin Dental Supply Co., Inc., 147 W. 42nd Street in New York, formerly sold only dental sundries in the New York area. During 1974, new owners expanded operations and began selling dental equipment.

e) City Dental Supply, 369 Washington Avenue, Garden City Park, New York, previously sold only small amounts of dental equipment to institutions. Within the past two years, this company has begun selling equipment to dentists. Recently, within the past six to eight months, they opened a new equipment showroom in Garden City Park on Long Island. They now offer all major lines of equipment to dentists.

f) Ripco, 461 Court Street, Brooklyn, New York, has within the past two years entered the dental equipment market. This company does not sell sundries, but offers a full line of equipment and service.

g) I. Chodos, 241-21 Braddock Avenue, Bellrose, New York, has recently expanded its equipment sales. Within the past year, they have added a new service department and have become a major full service dental dealer.

h) M&M Dental Supply, 231 E. 14th Street, New York, has within the past year come under new ownership. This company has expanded its sales to include dental equipment as well as sundries under its new ownership.

i) Newark Dental, 726 Fairfield Avenue, Kenilworth, New Jersey, was formerly only a sundry dealer. Within the past year, this company has begun to offer major equipment lines.

j) American X-Ray, 568 Grand Avenue, Englewood, New Jersey, formerly offered service for dental X-ray equipment. Within the past two years, this company has begun selling as well as servicing dental X-ray equipment. (Kalik Aff. I ¶¶ 6, 7)

Mail order companies have increased their equipment sales and have expanded the scope of the equipment lines they offer. Specific examples of these companies are:

a) Blank/Sherry	Bay Shore, NY
b) Darby	100 Banks Avenue Rockville Center, NY
c) By-Rite	Box 200 210 Ditmas Avenue Brooklyn, NY
d) Wolins	Farmingdale, NY
e) Interstate Drug Exchange	Engineers Hill Plainview, NY
f) Unitek	140 Sylvan Ave., Englewood, NY

These companies are now advertising many major equipment lines. (Kalik Aff. I ¶ 8)

Eighth. Summary. The District Court's opinion found that a violation occurred in the sale of dental equipment and entered a finding which is supported in the record that a dentist needs a "dental dealer" *when he opens his office.* The defendant basically believes that the District Court erred in not realizing that most dental equipment is not sold to such "new dentists;" that is be-

cause there are very few new dentists each year. Most of the equipment is sold piece by piece as part of new technology or replacement equipment to the thousands of dentists who have been in practice many years. In such sales, dental dealers regularly compete with manufacturers and others who are not physically located in the New York area. The District Court did not consider such facts and the substantial entry which has occurred. Finally, the District Court mistakenly concluded that there is some evidence of record to measure sales of dental equipment to dentists *when they open up their office*. No such statistics are of record and, further, there are no statistics of record to establish the volume of dental equipment *sold to dentists*. The findings of the District Court, defendant respectfully suggests, are thus clearly erroneous and not based upon reliable, probative evidence of record.

The Order

Finally, assuming that the violation found by the Court is sustained, the Final Order more than cures the violation, directing divestiture by establishing a substantial entity to which Healthco's entire dental equipment sales and repair business would be assigned and sold. The decision and Order eliminates Healthco from the equipment market by stripping it of its entire capacity in this area and substantially prohibits Healthco from soliciting equipment sales from its existing customers, a current list of which would be offered for sale as a part of the business entry formed by the Order.

ARGUMENT

I.

THE GOVERNMENT'S CASE IGNORES THE ALTERNATE SOURCES OF SUPPLY AVAILABLE TO EACH CLASS OF CUSTOMERS AND AVOIDS THE ACCEPTED STANDARD OF DETERMINING A GEOGRAPHIC OR PRODUCT MARKET.

Section 7 requires an analysis totally omitted from this case by the government: it is essential to identify which sellers represent alternate sources of supply to the various customers. It is the customer who determines the realistic alternative which in turn settles who is a "competitor." Section 7 requires analysis of the demand side of a market.

This principle was simply ignored in the hodge podge of findings and statistical evidence collected by the government ignoring the compelling fact that each of the different customers for each of the different products has a different group of sellers and alternative sources of supply.

Laboratories and institutions purchase precious metals, teeth, dental equipment and sundries from many suppliers located outside of the New York area. Those customers have different lists of mail order houses, manufacturers and "dental dealers" for each of those products. The government simply ignored such distinctions.

The case was dismissed for all products except dental equipment. Applying the legal principle of alternative

sources of supply to the dental equipment business demonstrates two controlling propositions:

First. Dental equipment sold to institutions and laboratories includes substantial competition from manufacturers; the bid system used by institutions and the broad geographic area to which a dental laboratory turns to obtain its supplies includes dental dealers, mail order houses and manufacturers. The District Court affirmatively found significant dental equipment manufacturing competition in sales to laboratories and institutions. (*Supra,* p. 18)

Second. The dentist as a customer can turn to different suppliers depending upon whether he is opening up his office or purchasing equipment at a later time — after he had been in practice — and in that type of purchase the dentist regularly turns to many sources of supply other than the traditional dental dealer. (*Supra,* p. 21-22)

This same analysis — the necessity to establish patterns of distribution between suppliers and buyers — must be applied to the government's suggestion that the court erred in not finding that "all dental products" should be regarded as a line of commerce. That suggestion can only be seriously made by a conscious effort to disregard the overwhelming body of law discussed *infra* and the application of those principles to this industry. If sales to dental laboratories, institutional bid business, mail order houses and the purchase of sundries by dentists are all to be grouped in the same market, then it is palpably absurd to sample only selected dental dealers in the New York metropolitan area. The District Court has found that dental laboratories and institutions purchase a substantial amount of equipment from manufacturers located all over the country; the District Court has further found that in the sundries

market, mail order houses outside of the New York area supply regular competition to traditional dental dealers in the New York area. Finally, precious metals and such items as "teeth" are purchased by dental laboratories in a regional or national geographic market.

Since customers in New York can regularly turn to all of these sources of supply for many of the products included in the generic term "dental products" then it follows, under the law, that the market is in no way limited to the New York metropolitan area. The government's suggestion must be rejected for another reason: There are no common characteristics between these products which would support the suggestion that they have common price or seller-buyer relationships which are necessary findings in order to treat the various products alleged in the complaint in one line of commerce called "all dental products".

The record shows that laboratories and institutions buy significant equipment from manufacturers. Plaintiff's Exhibit 45, the partial listing of such manufacturers' sales, demonstrates that manufacturers are significant alternate sources of supply for such customers.

PX 45 also demonstrates that manufacturers provide an alternate sources of supply of dental products to dentists. However, PX 45 reflects the inherent fallacy of the government's failure to analyze the industry from the standpoint of the buyer, ignoring the required determination of what each class of buyer has as realistic alternate source of supply. As a result, *the volume of sales to dentists of dental equipment*—which is the purported area of violation is not of record in this case.

As Judge Weinfield appropriately stated in the famous Bethlehem-Youngstown case, *United States* v. *Bethlehem*

Steel Corp., 168 F. Supp. 576 (S.D. N.Y. 1958), the determination of the market in Section 7 must be analyzed with reference to the buyer and to whom he can realistically turn for an alternative source of supply. In that case, the defendants argued that Youngstown in Pittsburgh did not compete and was not in the same market as Bethlehem, located in Gary, because they basically operated in two different markets. The government argued successfully that those customers located between the cities could buy from either Pittsburgh or Gary. Since they could turn to either area for a supply, the market consisted of competition between the two. Based upon that competition, a violation of Section 7 could be found.

> Competition is not just rivalry among sellers. It is rivalry for the custom of buyers. . . . Thus competitive forces may move in a number of directions—buyer against buyer; seller against seller; buyer against seller. But however competition is defined and whatever its form or intensity, it always involves interplay among and between both buyers and sellers. *Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful.* (*Id.* at 592 Emphasis supplied)

The same analysis has been used in determining market structure in banking, *United States* v. *Provident National Bank*, 280 F. Supp. 1, 8-9 (E.D. Pa. 1968):

> Since there is a *reasonable* interchangeability and meaningful competition for the savings dollar and mortgage loans, such competition from other financial institutions must be considered in order to get a true competitive picture * * * Thus, one-half of a bank's deposits are subject to competition, not only

> from other commercial banks but mutuals and savings and loan associations as well.

In the well-stated decision of the Southern District in *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 188 (S.D. N.Y. 1960), the court observed:

> The fact that feature films are identifiable as such and are treated separately for certain purposes does not signify that they do not face the vigorous competition of other types of television programming material or that they have competitively distinct characteristics or uses.

The case which draws the closest analogy to the instant case is *United States* v. *Gimbel Brothers, Inc.*, 202 F. Supp. 779 (E.D. Wis. 1962). In that case, the government challenged an acquisition between two Milwaukee department stores. The government's line of commerce theory, that department stores were a relevant market, was rejected and the court stated:

> The affidavits show without dispute that there is much vigorous competition in retail marketing in Milwaukee County by many department stores, some large and some small, and by many specialty shops, discount houses, shopping centers, strip shopping centers, mail order houses and the like.
>
> * * *
>
> The court finds that the relevant product market is comprised of much more than that of department stores alleged by the plaintiff. The Court finds that there are literally hundreds of effective competitors of department stores, many of which share to varying degrees what the plaintiff claims are the "unique characteristics" of defendants. (*Id.* at 780)

The facts of record in the instant case demonstrate that the reasoning set out in *Gimbel Brothers* is applicable to the dental products market; there are literally hundreds of sellers of dental products, both large and small who separately and together sell the same products and services to the same customers in direct and vigorous competition with defendant. Neither the law nor the facts permit acceptance of the constrained line of commerce theories pursued by the plaintiff.

Plaintiff has relied entirely on the notion that the sales of the few "dental dealers" they identified constitutes a line of commerce. As the court in *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 at 194, concluded:

> The Government has insistently maintained that its proof on the issue of substantial lessening of competition will be limited to showing the anticompetitive effects of the Distribution Agreement on the business of distributing feature films in the metropolitan New York area. *No proof was offered by the Government on any broader line of commerce. Thus, since the court has found that the line of commerce is broader than feature films, the issue of a probability of a substantial lessening of competition, as such, need not be considered because, concededly, the Government's proof is insufficient.* (Emphasis supplied)

Applying the same rationale to the instant case, the plaintiff failed to meet its burden here as decisively as it did in *Columbia Pictures*.

The law, as well as common sense in analyzing the realistic problems of competition, requires that the government fairly include in its analysis of a market the realistic alternative sources of supply. Surely if a group

of companies can materially affect the price structure of an industry and buyers regularly purchase products from those sources, it is specious to exclude such entities from competition. The law ultimately deals with monopoly or attempts to monopolize. The monopoly or its attempt is defined as the ability to control price or entry. If entry occurs and if price competition occurs, companies making such entries and offering such price competition who are available alternative sources of supply must logically be included in the market.

In *Erie Sand and Gravel Co.* v. *F.T.C.*, 291 F.2d 279 (3d Cir. 1961), the Federal Trade Commission entered detailed findings that the Erie Sand and Gravel Company (in the Cleveland area) violated the law in making various mergers involving the sand industry. The Court of Appeals for the Third Circuit said, however, that only by consciously excluding lake sand from the market could these anticompetitive effects be determined.

> Only through its drastic reduction and fragmentation of the relevant market area, combined with its rejection of a large amount of the evidence introduced before the Commission as to sales even within the reduced area, has the government escaped the conclusion that pit and bank sand actually commanded at least as large a share of the market for concrete sand near Lake Erie as did lake sand.
>
> * * *
>
> Yet, if that larger section is used to define the relevant market, as it must be on the present record, *then the Commission was clearly wrong in ignoring the large sales of pit and bank sand within that area in its determination of the effect of the merger in question on competition.* (*Id.* at 282-283) (Emphasis supplied).

The government caused the court to focus on a single, narrow, unrealistic aspect of overall dental equipment sales to dental customers, i.e. the sale of dental equipment, by traditional local dental dealers, to new dentists opening their practices. The government has done so because it is only with respect to these customers that the court found local dental dealers to be the primary source of supply. (DC 6). The effect of this distorted analysis is to focus on a truncated portion of the market admitted by the government to be "comparatively small." Indeed, only 22% of Healthco's total equipment sales are to such customers. (*Supra*, p. 18)

As a result, the government ignores three basic areas of competition in selling to dental customers which constitute the vast majority of equipment sales:

(i) Sales to institutions;

(ii) Sales to dental laboratories; and

(iii) Sales to dentists already in practice or the "added or replacement" equipment market.

The record demonstrates that each of the companies listed, *supra*, pages 19 and 20, sells dental equipment to the same customers to whom Healthco sells. Yet each of those companies, which constitute an alternative source of supply in connection with most equipment sales, is *excluded* from the market by the Trial Court.

Healthco submitted evidence indicating that institutional customers are substantial purchasers of equipment directly from manufacturers. For example, a veterans hospital in New York purchased $287,000 worth of equipment, *86% of which was bought directly from manufac-*

turers. Of further significance is the fact that 71% of that purchase, or over $200,000, was purchased from vendors located beyond the New York metropolitan area. Based on this, and additional, evidence that such customers regularly turn to manufacturers and others in a national market, the District Court correctly concluded that such sellers were alternate sources of supply for laboratory institutional customers. The court stated:

> [T]he impact of direct sales of these manufacturers is on dental laboratories, government and other institutions. (D.C. 268)

No evidence in this record in any way contradicts the fact that manufacturers are alternate sources of supply for these customers.

Just as the government has excluded manufacturers competing with traditional dental dealers, it has also substantially ignored the growing competition from mail order dealers in the equipment area.

The Trial Court compounded the errors identified above because the court examined Healthco's equipment sales to determine its share of the market, *and included all* of Healthco's equipment sales to *all* customers, including laboratories, institutions, and all dentists. Obviously this does not prove that the law was violated in the particular product market used by the District Court (dental equipment).

Since the government and the Court have no basis on the record for determining the percentage of equipment sales to the various classes of customers, even by the traditional dealers surveyed, much less by manufacturers and mail order dealers, it is simply impossible to deter-

mine with any degree of reliability whatsoever what Healthco's share of equipment sales were.

The error in the government's approach and the Court's conclusion demonstrate precisely why the law requires merger cases to be analyzed from the point of view of the *customer* and the various alternate sources of supply from which he purchases.

II.

THE ACQUISITION OF SEVERAL MARGINAL PROPERTIES AND A SINGLE HORIZONTAL COMPETITOR DOES NOT ESTABLISH A VIOLATION OF SECTION 7, IN AN INDUSTRY EXPERIENCING VIABLE, GROWING COMPETITION AND ENTRY.

The government is not correct that Healthco made a series of viable horizontal acquisitions which constitute a per se violation of Section 7. The District Court had no difficulty concluding that substantial and meaningful new entrants and new ways of doing business have materially affected this industry. (D.C. 35, 36). Old ways of doing business and old forms of selling have changed.

Healthco entered the market and acquired three traditional dental dealers having very serious business problems. General was being operated by a creditors' committee. (PX 46 pp. 11-13) As is fully considered, *supra,* S. S. White, Sechter and General were admittedly wholesalers selling dental products in the New York area but were performing poorly in the context of a changing industry where competition was growing annually from new competitors offering aggressive price competition. The one viable horizontal acquisition (Syosset) must be analyzed with these structural changes in mind.

The Federal Trade Commission and the courts have considered "horizontal" and "market extension" acquisitions in the context of industry change. The Federal Trade Commission completely dismissed a case that it had brought involving Sexton Foods where it found that new types of selling in the industry changed the nature and extent of competition. *Beatrice Foods Co.*, CCH Trade Reg. Rep. ¶20,121 (FTC Dkt. 8814, September 28, 1972) This $100,000,000 acquisition was found to be lawful even though made by a billion dollar food company, in part because "the record shows that a new type of selling has grown in recent years: wholesaling to multi-unit food service organizations known as 'MUFSO' . . . . The record shows that MUFSO-type wholesaling commenced around 1958 and has grown rapidly." *Id.* at 22,106. This change in industry structure and viable new competition came from different methods of doing business and accounted for substantial new entry which made it impossible to find the necessary "entry barriers." In dismissing the case, the Federal Trade Commission concluded: "The condition of entry into the market has been clearly recognized in the decided cases under Section 7 as a highly important structural variable * * *", *Id.* at 22,110, see: *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972); *United States* v. *Penn-Olin Co.*, 378 U.S. 158 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). The growth of competition, based upon what the Commission found to be "a new type of selling," made it impossible to determine the question of the effect on competition of the acquisition using the traditional methods of market analysis.

The Supreme Court in *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974) recognized this essential principle. In reviewing a major acquisition in the coal industry the Court dismissed the government's case even though the Court found that defendant substantially increases its market share under "traditional analysis." The Court held that it was necessary to look to the industry itself to determine what the company's "future ability to compete" will be. In looking at the coal industry, the Court found that fundamental changes in the structure of the market for coal rendered useless the traditional methods of proving a violation of Section 7. Evidence of production was of little significance in an industry that since World War II had been selling an increasing amount of its output to electrical utilities under long-term requirements contracts. *Id.* at 499. Under the new and evolving structure of the coal industry, the state of a company's uncommitted reserves of recoverable coal was found to be far more significant as a measure of the company's future ability to compete. Since the acquired company's reserve prospects were "unpromising" in the *General Dynamics* case, the acquisition was held not to be violation of Section 7 of the Clayton Act.

The Court in *General Dynamics* reaffirmed the principle that "a merger had to be functionally viewed, in the context of its particular industry" because "only a further examination of the particular market—its structure, history and probably future—can provide the appropriate setting for judging the probably anticompetitive effect of the merger." *Id.* at 498, citing *Brown Shoe* v. *United States*, 370 U.S. 294, 322 (1962).

This record contains testimony by experts such as David Ellis that the traditional dental dealer is a declining

factor in the market—like the street salesman in institutional food (*Beatrice, supra*)—and that new and meaningful competition is growing in the distribution of dental products. (T. 476-478) The Supreme Court in the *Brown Shoe* case established Section 7 analysis must be made based upon the peculiar exigencies of each case to determine whether a particular acquisition, in its own context, has any significance.

As the District Court found in this case, growing price competition and new entry are changing this business. (DC 7, 8, 22, 23, 35, 36) The experts predict further changes in the way dental products are sold. (T 403, 476-484) On this record the dentist has more and more places to shop for his supply of products at cheaper prices. (*Supra*, p. 3) The government's own study (PX 45) shows a 25% increase in direct manufacturer sales from $4.8 million to $6 million in the period 1968 to 1970.

In the relief hearings, further evidence bringing the facts to a more current date were admitted and are of record. Those facts compel the conclusion that the sale of dental equipment, having in mind the substantial number of new entries, Healthco's acquisitions had no adverse effect on competition.

As the Court stated in *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D. N.Y. 1960), after a similar review of the competitive nature of the market:

> . . . the Government's case on this issue ignores the types of information useful in determining whether the vigor of competition has been or will be impaired as a result of the Distribution Agreement. *A substantial anticompetitive effect cannot be determined by simply showing Screen Gems' position in New York*

among some number of feature film distributors and its relative percentage of license fees contracted.

* * *

Assuming arguendo that proper product and geographic markets have been defined and shown on a realistic basis, *the question of the reasonable probability of a substantial lessening of competition must also be scrutinized realistically.* Not all acquisitions are proscribed by Clayton Act, §7. Acquisitions are proscribed only if they will probably result in a substantial anticompetitive effect.

* * *

Statistics dealing with only rank and percentages do not by themselves suffice to describe whether the vigor of competition has been affected. (*Id.* at 196. Emphasis supplied.)

* * *

In terms of actual performance by Screen Gems, it is evident that, since August 2, 1957, it has become increasingly difficult for Screen Gems to sublicense its feature films for television stations in Metropolitan New York and in other cities. This is attributable to the economic strength of the buyers *and to the present and increasing impact of the above-described competitive factors,* including the expanding supply of programming material. Not only has Screen Gems made increasingly fewer sales, but those it has been able to make have been for smaller numbers of features, . . . (*Id.* at 201. Emphasis supplied.)

The effects of Healthco's acquisitions on competition are not subject to speculation.

As of 1970, the former S. S. White outlet (which became Healthco's Rower Division), was losing between $1,500 and $5,000 per month. (PX 57, p. 10). Total Healthco sales in the New York area dropped in 1971 as a result of the increase in competition and influx of new competitors. (T 565, 568).

Healthco's competitors who were called to the trial testified that they were growing vigorously and increasing their sales substantially to customers in the New York metropolitan area. (T 134; T 224; T 254-259; T 704, 707).

At the relief hearing, Healthco introduced equipment sales figures of its competitors who testified for the government at the trial. That data covered a four year period, updating the last available figures in the trial record, and shows the following:

	Total Equipment Sales & Service		% Increase
	1970	1974	
DURABLE	$ 219,375	$1,372,263	526%
WALTER	$1,043,830	$2,846,458	173%
CENTRAL	$ 646,218	$1,249,402	93%

(Krochmal Aff.; Walter Aff.; DeMarco Aff.)

We respectfully suggest that the District Court erred in finding a violation of Section 7 with respect to dental equipment sales made by traditional local dental dealers. This method of distributing dental equipment has been shown to face substantial new competition specifically in the New York area.

III.

HEALTHCO'S ENTRY INTO WESTCHESTER (HEBARD) IS A MARKET EXTENSION ACQUISITION INVOLVING "POTENTIAL" COMPETITION ISSUES AND THE COURT ERRED IN ANALYZING IT AS A HORIZONTAL ACQUISITION.

The complaint alleges that the new entry into West chester by Healthco is nonetheless a horizontal acquisition. The record however will be searched in vain to locate a single witness who testified to the existence of any

such competition or to locate any evidentiary basis for the conclusion. The evidence of record supports precisely the opposite conclusion: the Hebard acquisition was in fact a market extension acquisition.

At the trial and in its appeal brief, the government has repeatedly urged that the salesman's contact with his customers is essential to the traditional dealer as compared to the other sellers. The record supports this contention (T 101, 108; T 551, 544, 578). Morton Gutterman, a government's witness, testified that the size of the sales territory which a local dealer can cover is limited by the number of salesmen employed by such dealers. (T 157-58) The territory is further limited by the proximity of the local dealer to his customers. (T 563) Plaintiv's witness, Henry Walter, testified:

> Q. What are the factors which determined the area in which you could compete?
>
> A. The size of the sales force and the ability to service the customers efficiently from the home office, equipment, service, delivery of merchandise, etc. (T 84)

Hebard, located in White Plains, is between 40 to 50 miles from Manhattan (T 563), and defendant's president, Mr. Cyker, testified that he could not service Westchester from its facilities in New York and that Healthco did not have the sales personnel in any event. (T 559, 563) All of the facts of record support this conclusion.

Hebard's sales concentrated almost exclusively in Westchester and Rockland Counties with virtually no sales beyond that area. (PX 13) Further, neither Healthco's initial entry acquisitions nor its Hebard-Metro acquisition produced any substantial sales presence in the Westchester-Rockland area. (PX 13, PX 8, 10, 11) The combined sales of S. S. White, General and Sechter as of

1968 into Westchester and Rockland Counties, constituted no more than 4% or 5% of the total sales of those companies. (PX 8, 10, 11)

Of more significance, however, is the total failure of proof on sales of "dental *equipment*." The record contains no evidence—none—that Healthco sold any dental equipment in Westchester County or that anyone sold dental equipment in Westchester County from Long Island, Manhattan or New Jersey, and the record is equally silent on the sale of even one piece of dental equipment from Westchester County into Long Island or Manhattan.

Indeed, the only evidence of record is that the dentist opening his practice, as the District Court found, needs a local dental dealer. This is a function of service. After the dentist is in business, he may well buy pieces of equipment from Chicago or Newark which involves a totally different market. These essential factors, however, have been ignored by the government which has shown only, with respect to Hebard that it sold dental *products* in the "New York Metropolitan area."

As the record stands, Healthco was simply not in competition with Hebard in dental equipment. Thus, Healthco's acquisition was a market extension acquisition and is controlled by a "potential" competition analysis. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). This difference in legal analysis (compared to horizontal acquisitions) is required by the compelling conclusion that the substitution of Healthco as the owner of these assets —without more and without any elimination of competition directly flowing from the acquisition—is of no initial competitive significance. The courts and the Federal Trade Commission have examined "potential" competition and the need in such cases to determine the condition of entry

and the general level of concentration in the product market, as well as the changes in the structure of the industry in situations where new ways of doing business can be used to predict viable new entry and the maintenance of a high level of competition.

In the case of *Beatrice Foods Co.*, CCH Trade Reg. Rep. ¶20,121 at 22,109, the FTC considered at length the question of proper method of analysis in a case involving the acquisition of a potential competitor. The court stated:

> Complaint counsel in essence attempt to rest their case on the existence of concentration ratios alone. The test for finding injury due to elimination of a potential competitor is not simple. Additional factors enter into any analysis of the loss of a potential competitor. Among these are: trends toward concentration in the market; extensive entry barriers; high probability that the lost potential competitor would have actually entered the market; whether the lost potential competitor was one of only a few such potential competitors and whether, if he had entered the market, his new competition would have had a significant impact on price and quality. Although the number of competing firms or trends toward concentration may be enough without more to condemn many horizontal mergers between existing rivals in a market, the condition of entry by new firms as well as these other factors mentioned above must be considered when dealing with elimination of a potential competitor. Even though elimination of a potential of a potential competitor may have substantial anti-competitive effects, unlike a merger between actual competitors, it does not increase one firm's existing share of the market or eliminate actual competition. The distinction between the two types of competition —actual and potential competition—must not be lost sight of.

The key to the elimination of the potential competitor is of course the check that potential competitors exert on monopolistic prices. *United States* v. *Penn-Olin Co.*, 378 U.S. 158 (1964). In the *Beatrice* case, the court found that market entrance was sufficiently easy so that potential entrants provided a check against monopolistic pricing. Similarly, in the instant case the record is replete with evidence that the consumers of dental products are increasingly price conscious, and the District Court concluded that mail order firms, offering lower prices, were growing and increasing their sales significantly. Moreover, the question of market entry in this case does not require speculation about theoretical capability of entry. The facts of record demonstrate that significant market entry has occurred and continued to occur right up through the time of the relief hearing at which the most current evidence in connection with the market was presented. (Infra pp. 7, 19-22).

Similarly, the FTC in the Beatrice case found that the acquisition did not affect competition by eliminating a potential entrant to the new market. In the instant proceeding, there is no evidence that Healthco was a significant potential entrant into the Westchester County area, and indeed the lack of geographic expansion since the time of the acquisitions underscores this fact. Having failed to recognize the fact that the Hebard Westchester acquisition was a market extension acquisition, the government similarly failed to present any of the essential elements to demonstrate that this market extension acquisition could have anti-competitive effects. Absent such evidence, the Hebard Westchester acquisition can-

not be considered part of any finding of illegality with respect to horizontal acquisitions involving dental equipment sales.

IV.

STATISTICS AND MARKET SHARE DATA: THE COURT ERRED IN IGNORING SIX INDEPENDENT STATISTICAL ANALYSES, INCLUDING THE BUREAU OF CENSUS, AND INSTEAD ADOPTED A PARTIAL SAMPLE OF ONLY ONE TYPE OF COMPETITOR PREPARED FOR THIS CASE USING HEARSAY QUESTIONNAIRES WHICH OMITTED SIGNIFICANT PARTS OF THE INDUSTRY.

Plaintiff's entire analysis of the market rests upon that "survey" which it designed, as stated by its own economic statistician, to fit its hypothesis of the case. In short, it included or excluded segments of the competitive market to give a self-fulfilling bias to the result. The plaintiff defined the market itself and sent questionnaires to those people that it decided were in the market. This approach is grossly unfair and improper and led to a result which does not comport with the economic realities of the market.

The Government's Methodology Is Deficient.

The *Manual for Complex Litigation,* 1 Pt. 2 *Moore's Federal Practice* (1975) specifically rejects the methods employed by the plaintiff. The Third Recommendation on statstical evidence states as follows:

> The underlying data, method of interpretation employed and conclusions reached in polls and samples should be made available to the opposing party far in advance of trial.
>
> It is desirable to consider a proposed poll at pretrial so that the flaws in the mechanics may be eliminated, to the extent possible, *before the poll is taken.*

> In any event it is desirable that questions going to the admissibility of the polls or samples be raised and, if possible, decided prior to the time they are offered in evidence. *However, no procedure should be adopted which in effect would place the burden of disproving admissibility on the opposing party.* (Emphasis supplied.)
> (Part I, Section 2.713)

The introduction of the government "survey" did, in fact, shift the burden of disproving the admissibility of the questionnaires the court admitted into evidence. Because of plaintiff's self-serving, ex parte, and unreliable method of collecting market statistics, defendant would be required to completely re-define the market and survey it by use of depositions upon written questions under the Federal Rules of Civil Procedure or by some other probative and reliable method at enormous expense to itself. Clearly, no such burden can, under the law, be shifted to the defendant. Yet that is precisely what occurred in this case.

The Government Methodology Led to Serious Errors Rendering the "Survey" Untrustworthy

Moreover, the cases which set out the standards for survey and poll evidence demonstrate that the minimum standards of truthworthiness were not met in this case. In the case of *State Wholesale Grocers* v. *Great Atlantic & P. Tea Co.*, 154 F.Supp. 471 (N.D. Ill. 1957), rev'd in part, 258 F.2d 731 (7th Cir. 1958), cert. denied 358 U.S. 947 (1959), the court enumerated the standards by which the survey should be tested:

> Neither the interviewers nor the supervisors engaged in the Shopping Survey were aware of the litigation, the purpose of this survey or the use to be made of the results of the survey. *Id.*, 154 F.Supp. at 497

In the instant case, the questionnaires themselves indicated on their face that the information was being solicited from Healthco's competition for the purpose of a government lawsuit against Healthco. (PX 26, PX 28) The court further stated:

> The sample design and all interviewers' arrangements were prepared independently of A&P and its attorneys. *Id.*

In this case, the questionnaire was designed by plaintiff's attorneys in an attempt to confirm their theory of the market and their idea of who the relevant sellers were. In fact, plaintiff's expert economist testified that he did nothing more in the preparation of these questionnaires than attempt to verify the hypothesis in the complaint. (T 309)

In the case of *Crown Zellerbach Corp.*, 51 FTC 1105 (1955), the Commission in examining proffered statistical evidence on the basis of answers to questionnaires noted in admitting that evidence that:

> [a]nswers to the questionnaires were required to be certified by an officer of the corporation and reports received were tabulated both as to dollar volume and percentage of aggregate sales by each supplier shown in the reports. *Id.* at 1106

The procedural requirements, *totally absent in this case,* are not merely technicalities. They are designed to insure the trustworthiness of the data collected. The consequences of the failure to minimally insure the accuracy of the data was demonstrated by defendant's witness, Mr. Sandler. He testified, in essence, that when he received the questionnaire he made an off-hand guess.

His testimony states:

> [T]he only thing I can assume is that I just said to somebody in my organization, you know, what are we doing, or something, give me an estimate. (T 765, 766)

When the defendant called Mr. Sandler to the trial it was demonstrated that his guess of $225,000 had been wholly inaccurate. His sales in the year 1970 actually were in excess of $600,000. (T 771)

An examination of PX 31 and 31A, the questionnaire responses, demonstrates the obvious guesswork, errors and inaccuracies in this survey. (See: Defendant's Memorandum in Support of Its Motion to Strike Plaintiff's Exhibits 31, 31(a), 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45.) For defendant to attack this "survey" in detail it would have been necessary to depose or call virtually every respondent to the trial in this case. It is precisely this shifting of the burden to the defendant that should not, in this case, have been permitted, as the above-cited reference to the *Manual of Complex Litigation* indicates. The District Court should have required the plaintiff to provide some credible evidence rather than unsupported hearsay questionnaires.

Of greatest importance is the case of *American Luggage Works, Inc.* v. *United States Trunk Co., Inc.*, 158 F.Supp. 50 (D. Mass. 1957), aff'd. *sub nom. Hawley Products Co.* v. *United States Trunk Co., Inc.*, 259 F.2d 69 (1st Cir. 1958). The survey in that case was *excluded* for the following reasons set out by the court:

> In considering the admissibility of this survey, the first point is to note its limited relevance. Those who designed the survey apparently did not fully appreciate the legal consequences of the point that

> there were at issue in this case two markets, — one wherein retailers were customers and the other wherein ultimate consumers were customers * * * The survey, having been limited to retailers, is inadmissible to show that in the market of ultimate consumers the plaintiff's design had acquired a secondary meaning. 158 F.Supp. at 52.

The "survey" in the present case should have been excluded for the same reason. The government's questionnaire, sent as it was only to those people considered by plaintiff's attorneys to be the relevant sellers, cannot be admitted to demonstrate that those are the only sellers in the market.

A ruling by this court sustaining the admission of "statistics" tailor-made to fit the plaintiff's theory of the case as they were here would permit an untenable burden to be placed on this defendant and would seriously undermine the fair presentation of market share evidence in future cases by its precedence. The ex parte preselection of the boundaries of a market by a plaintiff, gathered in a procedure designed to elicit only those statistics which support that market choice, should never be received in evidence as being presumptively trustworthy.

Healthco's Refutation of Government Survey

At the trial Healthco went far beyond its legal obligation to refute the so-called "survey" by offering detailed statistical and testimonial evidence to demonstrate that plaintiff has excluded the sales of numerous sellers of dental products to customers within the Metropolitan New York area. Plaintiff's market contentions are wholly inappropriate for the purpose of analyzing the effect on competition of Healthco's acquisitions for two reasons:

First, the excluded sales are so large that their size alone negates any possible inference that the sellers identified by plaintiff are insulated from competition by the excluded sellers.

Second, the size of the excluded sales alone demonstrates that sellers located in New York are not competing in a discrete market, but face substantial and increasing competition from sellers outside the New York area.

Defendant's evidence was not offered to precisely measure the market for the sale of dental products within Metropolitan New York. Defendant, of course, does not bear that burden. Defendant's evidence demonstrated, however, as did plaintiff's as well, that the *sales counted by plaintiff represented less than half and possibly only a third of the sales of dental products to dentists, laboratories, and institutions in the metropolitan New York area.*

Four independent evidentiary sources in the record demonstrate that the sales of dental products in the New York area are at least twice the size of the sales the government identified. Each of these evidentiary sources is independent of one another and *each confirms the basic reliability and accuracy of the other sources.* Those sources, which are discussed in detail below, are as follows:

A. Bureau of Census Data.

B. David Ellis' estimate of purchases, DX B, DX C.

C. Dr. Gould's analysis of manufacturer shipments in DX O.

D. Proofs Magazine survey of dentists' purchases, DX N; N-1, N-2.

A. The Bureau of Census Data

The census data reported in DX A listed 118 establishments who sold $54,968,000 worth of dental products who were located within metropolitan New York in 1967. At the trial, the government attempted to explain away the vast difference between the approximately 64 sellers it identified and the 118 the Census Bureau identified by inferring that the count of sellers in the census included branch stores as well as independent sellers. However, only six branch stores were found among all the dealers who are members of the two trade associations and who the government contends are the largest sellers. (T 465, PX 47, pp. 33-34)

The government further attempted to explain the disparity between the actual sales of those sellers identified in the census table (DX A) and their survey (PX 31, 31a) by suggesting that the census total included double counted sales among dealers. Sales *among* the dealers identified in PX 31 totaled only $1,578,000. If the government were correct, there would have to be a $23.5 million wholesale market in New York separate and apart from the wholesale dealer market its survey identified. (T 851, 852, 853.) No witness testified that a "shadow" wholesale market existed, and such an inference is patently absurd.

The question remains. What happens to the $25 million in sales of dental products identified by the Census Bureau and not accounted for by the government? At the trial the government suggested another alternative; perhaps New York wholesalers shipped these products out of the metropolitan New York area. No witness, however, testified that was the fact. But assuming, for the sake of argument, that such is the case, then the

magnitude of sales flowing from New York into the national market is so great that the metropolitan New York area is not a geographic sub-market. Certainly, if such a large volume of sales is flowing out of the New York area, no reason exists to believe, as the government contended, that sales flowing into the area are not sufficiently large to be counted.

B. David Ellis' Estimate of Purchases

David Ellis, an industry expert who is the statistician for the American Dental Trade Association, testified that because there were so many dental product sellers and because they were located throughout the United States, attempts to determine the size of any given market based on the sellers' activity would fail. His testimony was that the most reasonable and reliable approach was to look to the buyers and determine the volume of their purchases.

He first conducted his analysis three years before this lawsuit as part of a business project to obtain a reasonable estimate of the size of the purchases of dental products within metropolitan New York for an industry publication. (T 394.) In making his analysis, he used the tools of his trade, independent statistical data compiled by national trade and professional associations and the federal government. His complete analysis, including all of his source references, were transmitted to the plaintiff three and one-half years prior to the trial. (D Trial Memorandum X4.) His study indicated that metropolitan New York dentists and laboratories alone purchased at least $60 million in dental supplies and equipment in 1968. (T 416)

The government's expert, Dr. Schwartzman, after examining Mr. Ellis' analysis, could not impeach it. Furthermore, Dr. Schwartzman, when asked the ultimate question, gave a telling answer:

> Q. Do you have any reason to believe that Mr. Ellis' estimates for the New York area market is either too high or too low?
>
> A. No. I have no reason to believe that it is either too high or too low.

The testimony of Mr. Ellis stands, in final analysis, as a conservative estimate of a segment of dental products purchased by dentists and laboratories located in metropolitan New York.

C. Dr. Gould's Analysis of Manufacturer Shipments in DX O

Dr. Gould's analysis, as he testified, was to provide an independent check to both the government "survey" and to Mr. Ellis' analysis. (T 853, 854.) By examining the output side of the market (manufacturers' shipments of dental product), he confirmed that Mr. Ellis' analysis of the input, or demand side of the market, was a correct, if somewhat conservative, estimate. (T 729, 740, 741.) The analysis is as follows:

> *Step 1.* In 1967, U.S. manufacturers produced $201.8 million worth of dental equipment and supplies. (Line 19 of DX O).
>
> *Step 2.* Add the 50% wholesale markup to $201.8 million to determine the sales of those products by wholesalers. (Line 22 of DX O). The result: $302.7 million, at wholesale value, in dental supplies and equipment sold at the national level in 1967.

Step 3. Divide the national total of $302.7 million to determine the 17.4% allocable to the New York area. (Line 26 of DX O.) The result: $52.7 million worth of dental supplies and equipment allocable to the New York area in 1967.

Step 4. Increase the $52.7 million figure in 1967 by 10% to arrive at the 1968 value. The result: $58.0 million worth of dental products allocable to the metropolitan New York area in 1968.

The government's attack on Dr. Gould's analysis in no way disputed his ultimate conclusion; the government "survey" at best accounted for considerably less than half and probably only a third of the true sales of dental products to customers in the metropolitan New York area.

D. Proofs Magazine Survey of Dentists' Purchases, DX N; N-1, N-2

Proofs Magazine conducted a survey of dentists to determine their purchase habits. (DX N-1.) Question no. 1 of this survey tabulated the average amount dentists spent on dental supplies in 1972. The average annual purchases were $3,586, close to the American Dental Association figure reported for 1970, which was independently derived. (DX N-1, Question no. 1.) DX N-2 is a compilation made on the government's behalf of the number of "active practicing" dentists in the metropolitan New York area to whom Dental Economics, a magazine published for dentists, is sent. (DX N p. 21.) The count of dentists in DX N-2 excludes many active practitioners who are over age 60 and as many as 4,000 active practitioners over age 60 are not included in Dental Economics mailing list nationally. (DX N p. 18.) The count of dentists in DX N-2 also excludes dentists in the military and those in dental school facul-

ties. (DX N p. 22.) The number of dentists in DX N-2 totals 10,668 after the exclusions. If the number of New York dentists identified in DX N-2 were adjusted downward to only 10,000 for ease of calculation and the lower of the two average purchase figures (the 1970 ADA figure of $3,469) was used as a multiplier, those New York dentists purchased $34,690,000 worth of dental supplies[2] in 1970. This figure, specifically excluding as it does, laboratory purchases, equipment purchases by all customers, purchases by dental schools, military purchases, and various other dentists, is still larger than the government's calculated sales of $31.6 million by dental dealers of *all* dental products to *all* customers for the same year, 1970. (PX 34.)

This simple calculation based on yet another independent source demonstrates how far short the survey fell.

The independent evidentiary sources provided by the government also demonstrate their gross understatement of the market.

A. Sales data compiled in PX 45.

B. Sales data compiled from PX 31, 31a.

A. The Sales Data Compiled in PX 45

Direct sales by manufacturers in PX 45 disclosed substantial sales by manufacturers directly to dentists, dental laboratories, and agencies and institutions located within metropolitan New York. Those sales rose from $4,850,873 in 1968 to $6,020,315 in 1970. These sizable direct sales

[2] Question 1 of the Proofs Survey does not request equipment purchases.

are not the only direct sales made by manufacturers. PX 45 includes only 10% of such potential sellers.

B. The Sales Data Compiled from PX 31, 31a

A tabulation of the sales of the New York area sellers identified in PX 31, 31a, shows that those sellers made $4,389,774 in sales to customers located outside of the metropolitan New York area in 1968. The government excluded those sales from its measurement of the market. Although the exhibits demonstrate that mail order houses sell nationally, the government economist, Dr. Ritchin, made no meaningful attempt to identify or measure sales made within the New York area by sellers located outside that area, and he so testified:

> Q. Now, my question was do you know how many there are in the United States, mail order houses?
> A. I do not.
> Q. Did you make any effort to determine how many there were?
> A. I didn't.
> (T 325.)

The government, furthermore, gave no reason for its exclusion. The exclusion occurred because the "survey" was not conducted with a view toward determining what the realities of the market were. Dr. Ritchin admitted that he conducted the survey only:

> . . . within the context of the complaint on the hypothesis as stated in the complaint; it is stated to verify the hypothesis, and the hypothesis was stated in the complaint and that is all I followed. (T 309.)

Dr. Ritchin later admitted that sales from without the market should have been counted to determine the size of the market:

Q. Do you think it proper to identify mail order houses and survey them when making a survey such as this to determine the market?

A. If you would add on those who sell in the metropolitan New York area.

Q. Sell in the metropolitan New York area, yes, you think you should have gotten them all, yes?

A. Yes.

(T 325-326)

The District Court found that mail order sellers are dental dealers whose sales are relevant to the proper measurement of the market. But Dr. Ritchin admitted that he had no idea of how many such national sellers existed and made no attempt to determine who they were. This fact, viewed together with Mr. Walter's identification of numerous national sellers who compete with him and whose sales were admittedly not counted in the market,[3] wholly destroys any notion that the "survey" measured the sales of even those sellers the government contended constitute the relevant line of commerce.

Summary

All of the statistical evidence concerning the amount of competition for the sale of dental products in the metropolitan New York area adds up to one simple conclusion: no matter which data is used, regardless of how it is added, the hard fact is that the government

---

[3] Some of the sellers identified by Mr. Walter were located within metropolitan New York, *i.e.*, Dental Mart, Hackensack, New Jersey; Buffalo Dental, Brooklyn, New York; Savecon Dental, Long Island, New York; furthermore, one of those competitors, B. D. Van Kleek of Poughkeepsie is a "full service" dental dealer. (T 128.)

"survey" is impeached by virtually every piece of independent testimonial and statistical evidence offered in the course of the trial *by either party*. Stated most charitably, the sellers identified by the government are in direct competition with other sellers whose sales to dentists, laboratories, and agencies and institutions in metropolitan New York are from two to three times larger than the surveyed market. Market share and concentration data based on the "survey" is meaningless; it does not reflect the commercial realities of the market for dental product sales and affords no basis upon which the effect on competition of Healthco's acquisitions can be determined.

The government ignored the regular industry publications, and census data, and conducted its own uninformed partial sample by questionnaire to arrive at its abbreviated market estimate. It is the only total that is materially different from all other market analyses in this case—and of course is much lower than the recognized regularly published statistics on industry size.

V.

THE COURT'S DISCRETION IN FASHIONING AN ORDER LIMITED TO THE PRODUCT LINE IN WHICH A VIOLATION WAS FOUND SHOULD NOT BE DISTURBED; THE ORDER, HOWEVER, SHOULD PERMIT THE DEFENDANT TO REMAIN IN THE DENTAL EQUIPMENT BUSINESS.

The government, in its appeal, contends that all of the acquisitions, including those lines of commerce for which no violation was found, should also be divested. While there may well be some situations in which that is appropriate, the District Court's discretion in applying the divestiture only to dental equipment was proper and the

appeal by the government has not even remotely demonstrated that the findings were clearly erroneous.

The Supreme Court has consistently and clearly accorded the federal district courts a broad measure of discretion in the formulation of remedies in antitrust cases. *United States* v. *E. T. duPont de Nemours & Co.*, 366 U.S. 316, 322 (1961). Courts of equity have broad remedial powers and "are clothed with 'large discretion' to fit the decree to the special needs of the individual case." *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 (1972).

This great latitude is based upon the Trial Court's "opportunity to know the record and to appraise the need for prohibitions or affirmative actions" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76 (1950)), and the fact that a "trial judge's ability to formulate a decree tailored to deal with the violations existent in each case is normally superior to that of any reviewing court, due to his familiarity with testimony and exhibits." *United States* v. *Loews Inc.*, 371 U.S. 38 (1962). In addition, care must be taken to insure that the relief formulated by the courts is not punitive. *duPont, supra*, at 326. Thus the nature of the remedy directed by the Supreme Court is one which redresses the injury resulting from the illegality by restoring competition in the market which the Trial Court has found to have been foreclosed, without unnecessarily penalizing the defendant.

Total Divestiture Not Required

Divestiture of acquired assets is one alternative remedy for the violation of Section 7 of the Clayton Act. But it is "an extremely harsh remedy and should be decreed as to property obtained by an acquisition only when necessary to the restoration of the competitive situation altered

by the acquisition." *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223, 231 (D.C. Cir. 1962). The drastic remedy of divestiture cannot be had on assumptions; it must be supported by facts and economic theory. *United States* v. *Crowell, Collier & MacMillan, Inc.*, 361 F. Supp. 983, 991 (S.D. N.Y. 1973).

In balancing the need to restore viable competition without penalizing defendant, the Supreme Court has recognized that the form of antitrust remedy and the merits of divestiture must be determined based on the facts of each case. Following *duPont, United States* v. *Reed Roller Bit Co.*, 274 F. Supp. 573 (W.D. Okla. 1967) decreed partial divestiture under factual circumstances very strongly analogous to those in the instant case.

Reed Roller purchased AMF American Iron, Inc. which also made tool joints and drill collars, but manufactured expendable parts for oil drilling as well. The government charged anticompetitive effects only with respect to tool joints and drill collars, in which a violation was found.

However, the court rejected the government's request for complete divestiture and required divestiture only of operations in the product markets where a violation was found. The court found that divestiture of lines of commerce not found unlawful would not aid the restoration of competition in the joint collar industries; the court also found that a physically and economically workable partial divestiture could be effected. *Id* at 587.

The court further found material the fact that Reed's retention of the non-offending assets would permit continued competition in that product area. *Id.* at 589. In that context the court gave consideration to the hardship which would be imposed upon defendants through total divestiture.

Recently, the U. S. Court of Appeals for the Second Circuit affirmed the concept of partial divestiture as a proper remedy for a Section 7 violation and invoked the availability of this remedy as a rationale for denying a preliminary injunction. *F.T.C. v. Pepsi Co. Inc.*, 477 F.2d 24 (2d Cir. 1973). There the government sought to enjoin the acquisition by a large manufacturer of soft drink concentrates and syrups of a majority interest in a manufacturer, primarily of lemon-lime soft drink concentrates. In rejecting the FTC argument that denial of injunctive relief would render future divestiture impossible, the court said:

> As the Federal Trade Commission is successful in its adjudicatory proceeding, whether the divestiture should be total or partial must depend upon the facts in each case. It is clear here that the only offending assets are the subsidiary businesses of [the soft drink concerns] which represent a minor though profitable segment of Rheingold's business. *Id.* at 29.

The remedy of partial divestiture also finds substantial precedent in the orders of the Federal Trade Commission: in situations where less than all of the lines of commerce acquired are challenged as violative of Section 7 (*Scovill Mfg. Co.*, 53 FTC 260 (1956)); in situations where violations are not found with respect to all aspects of the challenged acquisitions (*Ash Grove Cement Co.*, 3 CCH Trade Reg. Rep. ¶20,956 (FTC Dkt. 8785, June 24, 1975)); and even in consent situations where the FTC permits divestiture of acquired assets other than the basic assets challenged (*Associated Dry Good Corporation*, (Consent Decree), 3 CCH Trade Reg. Rep. ¶20,882 (FTC Dkt. 8905, July 28, 1975)).

Department of Justice Accepts Partial Divestiture

The appropriateness of partial divestiture has in fact been recognized in the dental products industry. Thus, by *consent*, the Department of Justice Antitrust Division has twice agreed to partial divestiture of dental dealers. *United States* v. *Dentists' Supply Co. of New York*, 1967 Trade Cases ¶72,321 (E.D. Pa. 1968); *United States* v. *Pennsalt Chemicals Corp. and S. S. White Co.*, 1967 CCH Trade Case ¶72,322 (E.D. Pa. 1967) In the former, only 50% of the sales volume of the offending acquisitions was required to be divested, and in the latter about $4.4 million of sales volume of the offending acquisitions had to be divested. Although both settlements involved vertical acquisitions, the concept of the partial divestiture in the dental industry has clearly been accepted by the Antitrust Division. In fact, the divestiture in S. S. White represented only about one-sixth of its stores, and it was left with retail stores accounting for only approximately 1% less market share than it had prior to the acquisition. *United States* v. *Sybron Corp.*, 329 F. Supp. 919 (E.D. Pa. 1971).

The government can not argue that partial divestiture in a Section 7 case is inappropriate. A substantial number of recent consent decrees involved partial divestiture: *United States* v. *Norris Industries, Inc.*, 1975 Trade Cases ¶60,163 (C.D. Cal. 1975); *United States* v. *Wachovia Corp.* (Proposed Consent Decree), 5 CCH Trade Reg. Rep. ¶50,239 (W.D. N.C., 1975); *United States* v. *American Shipbuilding Co.*, 1973-1 Trade Cases ¶74,261 (N.D. Ohio 1973); *United States* v. *CIBA Corp.*, 1970 Trade Cases, ¶73,269 (S.D. N.Y. 1970). The *Norris Industries* settlement is particularly instructive in light of the Competitive Impact Statement filed by the Antitrust Division. In de-

ciding to permit Norris to keep one of the acquired companies, the Statement concluded:

> . . . if divestiture of all of PST were ordered at trial, the divested company would be the actual competitor in industrial cylinders and Norris would be returned to its acquisition status as a potential entrant. BNA Antitrust Trade Reg. Rep. No. 702, at F-2 (February 25, 1975).

Obviously, the Antitrust Division opted for two competitors in the market rather than one. Similarly, the total divestiture of the equipment business in this proceeding creates a viable competitive entity and permits Healthco at the same time to retain its existence in the market, and perhaps to return as an equipment dealer in the future, adding further competition to the market.

The Final Order Creates a Viable Competitive Entity

As noted, the law clearly requires that divestiture be limited to the offending assets, provided only that such divestiture creates a viable competitive entity.

[illegible] only aspect of the acquisition found in violation involved the dental equipment sub-market. In this regard, the Final Order anticipates every argument which the Government has made and provides for a completely viable new company.[4] All purported entry barrier problems are removed for the new company. Thus, every dental equipment specialty salesman employed by Healthco in the New York area will be transferred to the new company (J ¶ V (A) 2, 3) The new company will have access to every line of dental equipment which Healthco previously distributed and Healthco has undertaken to exercise its best efforts to insure that those con-

tacts are developed. (J ¶ II (8); V (A) 5) These lines include the largest and best recognized equipment lines in the country. (Kalik Aff. II ¶ 8, 9) Further, the new company will have a package of assets consisting of a well-equipped centrally located office headquarters, which also will include all necessary service and repair facilities as well as personnel. (J II (C), V (A) 1, 2, 3,; Kalik Aff. II ¶ 6) The new company will also have a ready-made portfolio of customers which it can easily retain and service, because the new company will employ trained equipment salesmen who are keyed to customer relations. (J ¶ V (A) 2, 3; Kalik Aff. II ¶ 3, 4, 5)

The government also seeks to argue that once an entry is accomplished an "equipment only" dental dealership cannot survive. The government argues that sundry sales are also necessary. However, there is nothing in the Final Order, nor the economic realities of the marketplace, which will in any way inhibit the new company from selling sundries. Indeed, the existence of trained salesmen who have contacts with dental customers increases the ease with which the new company will be able to commence sundry sales. The government's concern also ignores the fact that the court below clearly found that dental dealers could obtain sundry lines and that a large number of readily available sources of sundries supplies exist. (DC 35, 36)

---

[4] The government claims it did not have an opportunity to present its case is specious; it *opposed* a factual hearing and when the court indicated a willingness to accept evidence, the government offered none, although it did offer oral argument. The reason why no evidence was offered by the government is undoubtedly that all post-acquisition evidence indicates that (i) competition has not been lessened, and (ii) competition has greatly increased.

Final Order Gives More Than Total Divestiture

The ability of the new company to compete successfully is further underscored because the Final Order contains provisions which in effect give the government *more than* total divestiture in the offending assets. The Order not only requires Healthco to divest itself of the dental equipment business involved in the challenged acquisitions, but also requires divestiture of the assets which it acquired from S. S. White and National—two prior acquisitions expressly not challenged by the government.

Thus the relief provided by the Order not only insures the viability of the new company but constitutes a broader remedy than total divestiture of the offending assets option granted in Section 7 cases.

The Westchester acquisition (Hebard) is not "horizontal" (See Point III above) and should not be included in the dental equipment divestiture.

The Westchester facility (Hebard) represented an effort to enter a new geographic market which Healthco had not been capable of serving from its other locations, and not a horizontal acquisition. Moreover, with respect to dental equipment there is absolutely no evidence of *any* sales of equipment by Healthco or Hebard into areas where the other operated. Because of this the government was unable to present any evidence the Hebard acquisition had any competitive effect on the dental equipment industry in the northern New York suburban counties where Hebard operated.

Thus, there is no reason whatever to divest the dental equipment business in Westchester County. There is no competitive injury to "cure." The substitution of Healthco

as the owner of those assets does not constitute an unlawful acquisition no matter how often the government or the court below mistakenly refers to it as a "direct horizontal acquisition." Surely, when it comes to divestiture, it is totally inappropriate to require Healthco to get out of the dental equipment industry in any area where no showing of a violation has been made.

Accordingly, any Final Order should be amended and limited to the competition supposedly injured in the dental equipment business in the New Jersey—New York City—Long Island market in which Healthco did compete with the acquired Syosset, Long Island facility. This modification would preserve Healthco as a competitor in the dental equipment market. See *United States* v. *Norris Industries, supra*. As it is now, the divestiture order is a drastic remedy that eliminates Healthco from the dental equipment industry in the entire New York metropolitan area. The District Court has created a "new" company through his divestiture order and all of the dental equipment business, including the service departments, are transferred to that entity and will be sold. That will certainly cure the alleged anticompetitive effects in the dental equipment industry observed by the District Court. As noted above, the Order totally eliminates Healthco from that market. We respectfully suggest that such a drastic remedy is erroneous and does not preserve Healthco as a competitor which it had been even prior to the challenged acquisitions.

• • •

Thus, the Final Order should be modified to exclude the Westchester acquisition, as to which no findings of anticompetitive impact in the dental equipment market exist.

VI.
CONCLUSION

The defendant respectfully suggests to this Court that the findings of the Trial Court dismissing this case as to all products except dental equpiment are amply supported in the record; and the government has failed to demonstrate that these findings are erroneous.

Further, Healthco respectfully states that the Trial Court erred in its analysis of the dental equpiment market, ignoring evidence of substantial new entrants and new forms of competition, and adopting the government's erroneous concept of a market which does not conform to economic realities of the dental equipment industry. In addition, in entering a divestiture order, the court failed to recognize recent new competition which removes the need for any divestiture.

Defendant also respectfully submits that the Trial Court should not have ordered the divestiture of the dental equipment business in Westchester County which has no relationship whatever to the New Jersey, New York City and Long Island markets.

Finally, Healthco prays that this Court affirm the divestiture order entered below if the findings on dental equipment are affirmed, since no further relief is required on the facts of this action.

Respectfully submitted,

EDWARD L. FOOTE
THOMAS WM. BIANCHI
Attorneys,
WINSTON & STRAWN
Suite 5000
One First National Plaza
Chicago, Illinois 60603

Of Counsel:
IRA M. MILLSTEIN
PETER D. STANDISH
Attorneys,

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022

PROOF OF SERVICE

In the UNITED STATES COURT OF APPEALS
Second Circuit

..... Term, A. D. 197.....

No. 75-6011

UNITED STATES OF AMERICA, Plaintiff-Appellant,

vs.

HEALTHCO, INC., Defendant-Appellee.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

AFFIDAVIT

Michael A. Bergeron being on his oath first duly sworn, deposes and says at the direction of

Winston & Strawn
EDWARD L. FOOTE, ESQ.
THOMAS WM. BIANCHI, ESQ.
One First National Plaza - 50th floor
Chicago, Illinois 60603

attorneys for Defendant-Appellee

served two copies of the BRIEF

in the above entitled cause this 28th day of August 1975

on:

THOMAS KAUPER, ESQ.
JOHN J. POWERS, III, ESQ.
Department of Justice
Room 3414
Washington, D.C.

JOHN SIRIGNANO, JR., ESQ.
Department of Justice
New York, New York

by FIRST CLASS MAIL
at Chicago, Illinois, charges prepaid, and addressed as above.

And further affiant sayeth not.

Michael A. Bergeron

Subscribed and sworn to before me this

28th day of August, 1975

Doris M. Maynchen

Notary Public.

THIS SERVICE IS BEING MADE BY THE SCHEFFER PRESS, INC.